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Membership in a Social Group: Salvadoran Refugees and the 1980 Refugee Act

By ANGELA BOTELHO*

Member of the Class of 1985

I. INTRODUCTION

Prior to World War II, the United States did not distinguish between immigrants and refugees¹ for purposes of entry restrictions. In response to the large number of refugees in Europe after World War II, Congress enacted a series of measures ostensibly geared toward easing entry restrictions for victims of Nazi persecution. These measures, however, were actually and rapidly subsumed by Cold War preoccupations.

To remedy perceived deficiencies in earlier refugee admission programs, the United States enacted the 1980 Refugee Act (1980 Act).² The 1980 Act sought to create a comprehensive, nonsectarian refugee program based largely on the humanitarian ideals of the 1967 UN Protocol Relating to the Status of Refugees.³ Consistent patterns of discrimination in refugee admissions have continued to emerge, however, since the passage of the 1980 Act. This is due partly to the persistence of pre-1980 procedural requirements and partly to the enlarged role of the State Department in the adjudication process under the 1980 Act. These discrim-

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1. In non-statutory terms, an immigrant is a person seeking resettlement in a country other than his or her country of origin. A refugee, by way of contrast, is a person fleeing serious and endemic problems within his or her country of origin. Thus, the term refugee carries with it a note of urgency or crisis that the term immigrant does not.

2. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1101 et seq. and 22 U.S.C. § 2601 (1980)) [hereinafter cited as 1980 Act].

3. United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (*entered into force* Nov. 1, 1968) [hereinafter cited as Protocol]. It was from the Protocol that the 1980 Act adopted its definition of refugee.

inatory patterns are clearly demonstrated in the treatment afforded Salvadoran refugees under the 1980 Act.

After a discussion of the sources and legislative history of the 1980 Act and an analysis of its provisions, this Note will suggest a legal framework for handling refugee claims that will provide more flexible and equitable admissions procedures than current policies and practices permit. Specifically, this Note will examine the situation of Salvadoran Refugees under the 1980 Act and suggest a means within that Act by which a fairer and more favorable treatment of these claims can be achieved: namely, through application of a refugee admissions classification already contained in the 1980 Act but not heretofore applied to refugee admissions programs. That classification, "Membership in a Social Group," is contained within the definition of refugee in the 1980 Act. Through application of this category, implementation of the 1980 Act would be brought into closer conformity with the United Nations documents upon which the Act is based.

II. UNITED STATES IMMIGRATION AND REFUGEE LAW: BACKGROUND TO THE 1980 REFUGEE ACT

Prior to 1917, few restrictions were placed on entry into the United States,⁴ and there were no specific legislative provisions governing the admission of refugees.⁵ Rather, refugees and immigrants were not distinguished and both applied for entry under the same provisions. Beginning in 1917, however, successive acts restricted the number and categories of people admitted into the United States.

The first of these legislative acts, the Immigration Act of 1917 (1917 Act),⁶ excluded classes of people considered to be undesirable, such as anarchists,⁷ paupers,⁸ and those with communicable diseases.⁹ A literacy requirement was imposed on all immigrants, except those fleeing religious persecution.¹⁰ The Immigration Act of 1924 (1924 Act),¹¹ for the

4. Scanlon, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618, 619 (1981). See generally CRS REFUGEE REPORT, *infra* note 5.

5. CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., 1ST SESS., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES I (Comm. Print 1979) (prepared for the Senate Comm. on the Judiciary) [hereinafter cited as CRS REFUGEE REPORT].

6. Immigration Act of 1917, ch. 29, 39 Stat. 874 [hereinafter cited as 1917 Act].

7. *Id.* at 875.

8. *Id.*

9. *Id.*

10. *Id.* at 877.

first time expressly stated a purpose of limiting immigration.¹² To carry out this purpose, the 1924 Act initiated a quota system under which immigration was restricted based upon a percentage of the United States population as of the 1890 census and the applicant's country of origin.¹³ The obvious effect of the quota system was to freeze racial and ethnic balances at pre-twentieth century levels.

This system remained in effect until after World War II. Shortly after that war, in response to the large numbers of displaced persons in Europe, Congress enacted legislation which, for the first time, was specifically directed at refugee admissions. The Displaced Persons Act of 1948 (Displaced Persons Act),¹⁴ provided for the admission of a fixed number of refugees from Nazi persecution,¹⁵ certain Czechoslovakian refugees,¹⁶ and displaced forced-laborers from countries conquered by Germany.¹⁷ The term "displaced persons" was defined according to the Constitution of the International Refugee Organization.¹⁸ Displaced persons were given immigration priority subject to national origin quotas established by the 1924 Act. Applicants, however, had to meet a standard for admission based on persecution because of race, religion, or political opinion.¹⁹ The Displaced Persons Act also legalized the status of 15,000 European refugees already living in the United States,²⁰ and permitted them to remain in this country. Amendments to the Displaced Persons Act, enacted in 1950 and 1951,²¹ encouraged immigration of non-communist refugees from Europe and China and modified cut-off dates in the 1948 Act which had precluded ninety percent of the Jewish refugees from Germany, Austria, and Italy from applying for immigrant status.²²

11. Immigration Act of 1924, ch. 190, 43 Stat. 153 [hereinafter cited as 1924 Act].

12. *Id.*

13. *Id.* at 159.

14. Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 [hereinafter cited as Displaced Persons Act].

15. *Id.*

16. *Id.* at 1010.

17. Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 13 (1981).

18. Displaced Persons Act, *supra* note 14, at 1009. See CONSTITUTION OF THE INTERNATIONAL REFUGEE ORGANIZATION, entered into force Aug. 20, 1948, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3. For a brief discussion of the history of the International Refugee Organization definition of refugee and its application, see Cox, "Well-Founded Fear of Being Persecuted": the Sources and Application of a Criterion of Refugee Status, 10 BROOKLYN J. INT'L L. 333, 337-52 (1984).

19. Displaced Persons Act, *supra* note 14, at 1011.

20. *Id.*

21. Act of June 16, 1950, ch. 262, 64 Stat. 219; Act of June 28, 1951, ch. 167, 65 Stat. 96.

22. Anker & Posner, *supra* note 17, at 13.

The Internal Security Act of 1950,²³ an anti-Communist piece of legislation sponsored by the House Committee on Un-American Activities,²⁴ amended the 1917 Act deportation provisions to enjoin the Attorney General from deporting any alien subject to physical persecution in his country of origin.²⁵

The Immigration and Nationality Act of 1952 (1952 Act)²⁶ revised the 1917 Act and modified the national quota system of the 1924 Act by substituting 1920 census figures as the new percentage basis for the quotas.²⁷ The 1952 Act gave the Attorney General discretionary power to withhold deportation of any alien subject to physical persecution in his or her country of origin. This replaced the prior mandatory injunction against such deportations imposed by the Internal Security Act of 1950.²⁸

The Refugee Relief Act of 1953²⁹ was enacted after the expiration of the Displaced Persons Act in December of 1951 and provided for the admission of 204,000 non-quota refugees over a three and one-half year period.³⁰ These refugees were not subject to the limitations of the national origins quota system established in the 1924 Act. The Refugee-Escapee Act of 1957³¹ amended the Immigration and Nationality Act of 1952 and extended the admissions period for non-quota refugees from particular countries without changing the number to be admitted.³² Non-quota "refugee-escapees" were defined as those who, because of persecution or fear of persecution on the basis of race, religion, or political opinion, were fleeing Communist, Communist-dominated, or Middle Eastern countries.³³

The Fair Share Refugee Act of 1960³⁴ gave the Attorney General discretion to admit a "fair share" of refugee-escapees as defined in the

23. Internal Security Act of 1950, ch. 1024, 64 Stat. 987.

24. H.R. REP. NO. 2980, 81st Cong., 2d Sess. 9, *reprinted in* 1950 U.S. CODE CONG. & AD. NEWS 3886.

25. 1950 U.S. CODE CONG. & AD. NEWS, *supra* note 24, at 3912.

26. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified in scattered sections of 50 U.S.C.) [hereinafter cited as 1952 Act].

27. *Id.* at 175.

28. *Id.* at 214.

29. Refugee Relief Act of 1953, ch. 336, 67 Stat. 400, *amended by* Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121.

30. *Id.* at 401.

31. The Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639 (codified as amended at 8 U.S.C. §§ 1157-1159 (1980)).

32. *Id.* at 643.

33. *Id.*

34. Fair Share Refugee Act, Pub. L. No. 86-648, 74 Stat. 504 [hereinafter cited as Fair Share Act].

1957 Act who were outside their countries of origin and under the Mandate of the United Nations High Commissioner for Refugees.³⁵ A "fair share" was defined by the Act as twenty-five percent of refugees resettled in other countries.³⁶

The Migration and Refugee Assistance Act of 1962³⁷ is a refugee service allocation bill of limited impact in refugee admissions policy. Its primary significance is its definition of refugees: those fleeing persecution based on race, religion, or political opinion, from any country in the Western Hemisphere.³⁸ This definition expanded the territorial limitations on refugee status beyond the Communist/Middle East regions. This broader definition is of limited significance, however, as a result of the 1965 Amendment to the Immigration and Nationality Act,³⁹ still in force today. The 1965 Amendment incorporated provisions from earlier acts by applying to all refugees the criteria originally limited to those seeking entry from Communist, Communist-dominated, and Middle East countries. Thus, as a result, a refugee meeting these criteria could gain permanent resident status after two years in the United States even though not legally admitted under individual adjudication.⁴⁰ The 1965 Amendment also replaced the physical persecution deportation standard of the 1952 Act and gave the Attorney General the discretionary power to withhold deportation if an alien was subject to persecution "on account of race, religion, or political opinion."⁴¹ The amendment also repealed the national origins quota system.⁴²

The above legislative background to the 1980 Act reveals a succession of immigration and refugee laws enacted initially to preserve pre- and early twentieth century racial and ethnic population patterns. Subsequent concerns for victims of Nazi and fascist persecution, however, rapidly yielded to Cold War pressures and priorities. By way of contrast, as seen below, the United Nations instruments concerning refugees are less limited by ideological constraints.

35. *Id.* See *infra* text accompanying notes 169-75 for an explanation of the UNHCR mandate refugee designation.

36. Fair Share Act, *supra* note 34, at 74 Stat. 504.

37. Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121.

38. *Id.* at 122.

39. Immigration Act of 1965, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1101 et seq. (1976)) [hereinafter cited as 1965 Act].

40. *Id.* at 913. Lawful permanent resident status permits an alien to live and work permanently in the United States. It also permits the alien to eventually apply for United States citizenship. 1965 Act, *supra* note 39, §§ 101(a), 301.

41. 1965 Act, *supra* note 39, at 918.

42. *Id.* at 911.

III. UNITED NATIONS PROVISIONS FOR THE TREATMENT OF REFUGEES

A. The 1951 Convention

The Convention Relating to the Status of Refugees (Convention)⁴³ was adopted on July 28, 1951, by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.⁴⁴ Article 1 of the Convention defined the term "refugee" as a person who:

[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁴⁵

This Convention definition served to establish threshold entry requirements in the immigration statutes of many signatory countries.⁴⁶ These entry requirements were in contrast to the ideologically based 1953, 1957, and 1960 refugee laws of the United States.⁴⁷ The Convention did, however, give each Contracting State the option of specifically limiting application of the Convention to persons made refugees as a result of events in Europe.⁴⁸ The United States was not a party to the 1951 Convention.

Article 32 of the Convention, relating to deportation, provides that "[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."⁴⁹ Article 33 of the Convention further specifies, in relation to deportation, that "[n]o Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would

43. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 137 [hereinafter cited as Convention].

44. Convened under G.A. Res. 429, 5 U.N. GAOR Supp. (No. 20) at 48, U.N. Doc. A/1775 (1950).

45. Convention, *supra* note 43, art. 1(A)(2).

46. See Plender, *Admission of Refugees: Draft Convention on Territorial Asylum*, 15 SAN DIEGO L. REV. 45, 47 n.7 (1977) (discussing the following countries' statutes: Denmark: Act No. 224 of June 7, 1952, Regarding the Admission of Foreigners, § 2; France: Law No. 52-893 of July 25, 1952, and Presidential Decree No. 54-1055 of October 14, 1954, 1954 D.L. 432; Germany: Asylum Ordinance, 1953 BGBl 3; Norway: Aliens' Act of June 27, 1956).

47. See *supra* text accompanying notes 29-36.

48. Convention, *supra* note 43, art. 1(B)(1).

49. *Id.* art. 32(1).

be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."⁵⁰

The 1951 Convention is significant to the present discussion for two reasons. First, by its terms, the 1951 Convention limits the protections guaranteed by the signatories, including the principle of *non-refoulement*, to those who became refugees by virtue of events occurring prior to 1951.⁵¹ Secondly, by its definition of refugee, the 1951 Convention sets up an individual burden-of-proof requirement for the refugee applicant, a factor which has been used to undercut the effects of group refugee determinations in subsequent United States decisions.⁵²

B. The 1967 Protocol

The United Nations Protocol Relating to the Status of Refugees⁵³ (Protocol) essentially adopted the 1951 Convention definition of refugee. The Protocol, however, removed the Convention's temporal limitations by deleting the words "as a result of events occurring before 1 January 1951," and the words "as a result of such events."⁵⁴ In addition, parties to the Protocol pledged to apply the Protocol without geographic limitation,⁵⁵ thus eliminating the option of imposing such restrictions.⁵⁶ The Protocol, however, does not guarantee a right of admission into a signatory country; its protections apply only to refugees currently within the host country's borders.⁵⁷

The United States acceded to the Protocol in November 1968.⁵⁸ Until the passage of the 1980 Act, however, the Protocol afforded little relief to those attempting to gain its protections in the United States. The Attorney General's discretionary power to withhold deportation under the 1965 Act was deemed to have remained unchanged.⁵⁹

50. *Id.* art. 33(1). The French verb *refouler* is incorporated into the language of Article 33 and refers to the prohibition against returning refugees to areas where they would be subject to persecution. This prohibition is commonly referred to in its noun form as the "principle of *non-refoulement*."

51. *Id.* art. 1(A)(2).

52. See *infra* notes 76-77 and accompanying text.

53. Protocol, *supra* note 3.

54. *Id.* art. I(2).

55. *Id.* art. I(3).

56. See *supra* note 48 and accompanying text.

57. See *supra* note 49 and accompanying text. United States courts have held that the Protocol provisions do not affect aliens illegally within this country. See *infra* note 59 and accompanying text.

58. Protocol, *supra* note 3.

59. Although *Coriolan v. INS.*, 559 F.2d 993, 996-97 (5th Cir. 1977) held that the Attorney General's discretionary power to withhold deportation under section 243(h) of the Immigration and Nationality Act of 1952 "must now be measured" in light of the 1967 Protocol in

C. The United Nations High Commissioner for Refugees⁶⁰

The United Nations High Commissioner for Refugees (UNHCR), headquartered in Geneva, was created by the United Nations General Assembly in 1949⁶¹ as the successor to the International Refugee Organization created in 1946 to deal with the post-war refugee crisis.⁶² Its enabling statute⁶³ is recommendatory and does not bind member states.⁶⁴ Thus the UNHCR has moral, but not legal, authority over signatories of the 1967 Protocol who pledge to cooperate with UNHCR in its supervisory role over the Protocol's implementation.⁶⁵

The UNHCR's responsibility falls within four broad categories.⁶⁶

1. Protection

As defined in Articles 1 and 8 of the UNHCR Statute, all individu-

general and Article 33 in particular, *Pierre v. United States*, 547 F.2d 1281 (5th Cir. 1977), *vacated and remanded*, 434 U.S. 962 (1977) concluded from legislative testimony that accession to the 1967 Protocol did not change immigration procedures by which refugee status was to be determined. See *In re Dunar*, 14 I. & N. Dec. 310, 314-18 (1973), in which the Board of Immigration Appeals acknowledged the United States accession to the 1967 Protocol. Nevertheless the Board refused to stay under Articles 32 and 33 the deportation of an illegal alien unlawfully remaining in the United States, citing legislative testimony to the effect that ratification of the Protocol would not substantially affect statutory and procedural aspects of the 1965 Act. See S. EXEC. REP. No. 14, 90th Cong., 2d Sess. 6, 8 (1968); S. EXEC. DOC. K, 90th Cong., 2d Sess. at VIII (1968) for testimony by various State Department officials that the United States could meet its treaty obligations under Articles 32 and 33 within existing section 243(h) regulations. See also *Chim Ming v. Marks*, 505 F.2d 1170, 1172 (2d Cir. 1974) (*per curiam*), *cert. denied*, 421 U.S. 911 (1975) (holding that an illegal alien, although meeting the Protocol definition of refugee, is not protected from deportation by Article 32); *Kan Kam Lin v. Rinaldi*, 361 F. Supp. 177, 183 (D.N.J. 1973), *aff'd per curiam*, 493 F.2d 1229 (3d Cir. 1974), *cert. denied*, 419 U.S. 874 (1974) (holding that aliens who are not lawfully in the United States take nothing by terms of the Protocol).

60. Information in this section is largely based on Maynard, *Legal Competence of the U.N. High Commissioner for Refugees*, 31 INT'L & COMP. L.Q. 415 (1982); *Interview with Michel Moussalli, Director of International Protection, United Nations High Commission for Refugees Headquarters*, REFUGEES MAGAZINE, Sept. 1982, at 41 [hereinafter cited as *Moussalli Interview*]; United Nations High Commissioner for Refugees, Washington Liaison Office, Advisory Letter, Jan. 1982 [hereinafter cited as UNHCR Advisory letter].

61. G.A. Res. 319, 4 U.N. GAOR (265th mtg.) at 38, U.N. Doc. A/Res./319 (1949).

62. For additional material on the International Refugee Organization, see Plender, *supra* note 46, at 50 n.30 and Cox, *supra* note 18.

63. Statute of Office of the United Nations High Commissioner for Refugees, G.A. Res. 428, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950) [hereinafter cited as UNHCR Statute].

64. *Id.* See also Maynard, *supra* note 60, at 416.

65. Protocol, *supra* note 3, art. II, para. 1.

66. See Maynard, *supra* note 60, at 420-22.

als who fall within the scope of the statute⁶⁷ are entitled to protection.⁶⁸

67. UNHCR Statute, *supra* note 63, art. 6(A)-(B) defines those individuals who come within the Statute:

A. (i). Any person who has been considered a refugee under the Arrangements of 12 May 1926 and of 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.

(ii) Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it. Decision as to eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfill the conditions of the present paragraph . . . Any other person who is outside the country of his nationality, or, if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.

68. UNHCR Statute, *supra* note 63, art. 1 provides:

The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting governments and, subject to the approval of the governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities. . . .

Article 8 provides:

The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:

(a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and promoting amendments thereto;

(b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;

(c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation with new national communities;

(d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;

(e) Endeavoring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;

(f) Obtaining from governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;

(g) Keeping in close touch with the governments and inter-governmental organizations concerned;

(h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions;

The statutory language of the refugee definition generally follows the 1951 Convention⁶⁹ and 1967 Protocol⁷⁰ but omits the membership in a social group category.⁷¹ The stated policy of the UNHCR, however, is that the scope of protection also extends to displaced persons who find themselves in refugee-like situations.⁷² Thus, in effect, refugee definitions other than those imposed by the Statute may also qualify individuals and groups for UNHCR protection.

2. Assistance

Economic and technical assistance is offered to governments, refugee groups, and individuals falling under the scope of the UNHCR protection.⁷³

3. Good Offices

This concept is derived from a series of General Assembly Resolutions.⁷⁴ The UNHCR is invested with a discretionary power to aid those for whom a formal statutory determination of refugee status is not made, often for politically sensitive reasons.⁷⁵ Such "good offices" may apply to individuals who have achieved *prima facie* group rather than individual refugee determination and involve "an examination of the circumstances

(i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

UNHCR Statute, *supra* note 63, art. 8.

The legal basis for the UNHCR protective function is found in Article 8(a) of the Statute read together with paragraph 6 of the Preamble and Article 35 of the 1951 Convention, as well as Article II of the 1967 Protocol. UNHCR Advisory Letter, *supra* note 60.

69. See *supra* note 45 and accompanying text.

70. See *supra* note 54 and accompanying text.

71. UNHCR Statute, *supra* note 63, arts. 6(A)(ii), 6(B).

72. UNHCR Advisory Letter, *supra* note 60, at 4. As an example of those accorded the scope of its protection function, the Advisory Letter cites the Refugee Convention of the Organization of African Unity, which provides:

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin, nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

OAU Refugee Convention, Governing the Specific Aspects of Refugee Problems in Africa, art. 1, para. 2, adopted Sept. 10, 1969, U.N.T.S. 14691 (*entered into force* June 20, 1974).

73. See generally UNHCR Statute, *supra* note 63, art. 8.

74. See Moussalli, Director of Protection, United Nations High Commissioner for Refugees, Geneva, Inter Office Memorandum No. 12/80, Branch Office Memorandum No. 13/80, UN General Assembly Resolutions and the Competence of UNHCR (Feb. 12, 1980).

75. Moussalli interview, *supra* note 60, at 41.

which led the group to leave the country of origin.”⁷⁶ The good offices concept includes a discretionary power to aid groups of people who meet the *prima facie* group refugee determination but who may be unable to meet the definitional criteria enunciated in the Statute, the 1951 Convention, or the Protocol.⁷⁷ It is the position of the UNHCR that such groups are refugees and must receive *non-refoulement* protection.⁷⁸

4. Additional Activities

The UNHCR also has authority over “additional activities” as determined by the General Assembly.⁷⁹ This provision basically gives the General Assembly authority to direct activities of the UNHCR.⁸⁰

As the foregoing discussion illustrates, the United Nations has played a critical role in the development of refugee definitions which extend beyond national and ideological considerations. The United States pledged itself to adhere to the United Nations refugee definition when it acceded to the 1967 Protocol.⁸¹ This pledge was strengthened with the passage of the 1980 Act in which the Protocol definition of refugee was adopted in its entirety.

IV. THE 1980 REFUGEE ACT

A. Inadequacies of Earlier Measures

There were several problems regarding the admission of refugees prior to the passage of the 1980 Act.⁸²

The 1952 Immigration and Nationality Act contained no formal provisions for granting refugee or asylum status. Refugees entered or were admitted through one of four mechanisms:

(a) Special legislative enactments of the post-war period, such as the Displaced Persons Act of 1948, the Refugee Act of 1953, the Refugee-Escapee Act of 1957, the Fair Share Law of 1960. As noted above,

76. *Id.*

77. *Id.* at 42. See also Maynard, *supra* note 60, at 422.

78. UNHCR Advisory Letter, *supra* note 60.

79. UNHCR Statute, *supra* note 63, art. 9.

80. G.A. Res. 319, *supra* note 61.

81. This adherence arguably has the force of law under the United States Constitution, Article VI, Clause 2. *In re Dunar*, 14 I. & N. Dec. 310, 313 (1973).

82. See generally Note, *Those Who Stand at the Door: Assessing Immigration Claims Based on Fear of Persecution*, 18 NEW ENG. L. REV. 395 (1983) [hereinafter cited as Note, *Those Who Stand at the Door*]; Note, *The Right of Asylum under United States Law*, 80 COLUM. L. REV. 1125 (1980) [hereinafter cited as Note, *The Right of Asylum*]; Weiss-Fagan, *Well-Founded Fears and Burdens of Proof in Political Asylum: The Stevic Case*, IV REFUGEE REPORTS No. 15 (July 29, 1983), at 1; Anker & Posner, *supra* note 17.

these acts contained stringent ideological criteria as well as temporal limitations as to admissibility.

(b) Section 212(d)(5) of the 1952 Act, under which the Attorney General was given broad discretionary powers to "parole" refugees into the United States "for emergent reasons or for reasons deemed strictly in the public interest."⁸³ Congress intended that this provision be used on a case-by-case emergency determination basis,⁸⁴ but the provision was used instead to admit large groups of refugees.⁸⁵ Indeed, section 212(d)(5) became the standard means of refugee admissions. Thus the section was criticized as having "the practical effect of giving the Attorney General more power than Congress in determining limits on the entry of refugees to this country."⁸⁶ More than a million people were admitted under the parole authority of the Attorney General; a look at the breakdown over a twenty-three year period demonstrates the consistent policy considerations governing executive use of the 212(d)(5) provision.

83. Act of 1952, *supra* note 26, § 212(d)(5).

84. CRS REFUGEE REPORT, *supra* note 5.

85. *Id.* at 15.

86. *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 20 (1979) (statement of Griffin B. Bell, Attorney General of the United States) [hereinafter cited as *Hearings on H.R. 2816*]. For a survey of the role of parole authority under pre-1980 legislation, see Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 INT'L LAW. 204 (1968). For an administrative and legislative history of parole authority, see Comment, *Refugee-Parolee: The Dilemma of the Indo China Refugee*, 13 SAN DIEGO L. REV. 175 (1975); Note, *Refugees under United States Immigration Law*, 24 CLEV. ST. L. REV. 528 (1975) [hereinafter cited as Note, *Refugees under United States Immigration Law*]. For criticisms of parole authority as arbitrary, discriminatory, ad hoc, and inefficient, see Mackler, *Fleeing Political Refugee's Final Hurdle—The Immigration and Nationality Act*, 5 KY. L. REV. 9 (1978); Note, *Immigration Law and the Refugee: Recommendation to Harmonize the Statutes with the Treaties*, 6 CAL. W. INT'L L. J. 129 (1975); Note, *Refugees under United States Immigration Law*, *supra*.

*HISTORICAL SUMMARY OF REFUGEE PAROLE ACTION*⁸⁷

Year	Country	Total Number
1956	Orphans, Eastern Europe	925
1957	Refugees, Hungary	38,045
1960-65	Refugee-Escapees, E. Europe	19,734
1962	Chinese Refugees, Hong Kong, Macao	14,741
1962-79	Refugees, Cuba	692,219
1973-79	Refugees, Soviet Union	35,758
1975-79	Refugees, Indochina	208,200
1975-77	Detainees, Chile	1,310
1975-79	Chilean Refugees, Peru	112
1976-77	Refugees, Chile, Bolivia, Uruguay	343
1978-79	Refugees, Lebanon	1,000 (est.)
1979	Prisoners and Families, Cuba	15,000 (est.)

The summary chart clearly demonstrates that the vast bulk of refugees admitted under "parole" actions have been from Communist countries, an indication of the ideological use of the program.

(c) Section 243(h) of the 1952 Act, which was always used as an individualized form of relief. The section originally provided: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such a reason."⁸⁸

The physical persecution standard for withholding deportation, taken from the 1950 Internal Security Act (under which such withholding was mandatory),⁸⁹ is not defined in the statute or in the legislative history,⁹⁰ although case law gives some guidance.⁹¹ The standard of persecution in section 243(h) was amended in 1965 to read:

87. S. REP. NO. 256, 96th Cong., 2d Sess. 6 (1979); see *The Refugee Act of 1980*, 10 DEN. J. INT'L L. & POL. 155, 156 n.11 (1980).

88. 1952 Act, *supra* note 26, at 214.

89. See *supra* notes 23-25 and accompanying text.

90. Note, *The Right of Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 539, 541 (1981) (citing H.R. REP. NO. 3112, 81st Cong., 2d Sess. 9, reprinted in 1950 U.S. CODE CONG. & AD. NEWS 3886, 3912) [hereinafter cited as Note, *The Right of Asylum Under United States Immigration Law*].

91. See *id.* at 541 n.17 which sets forth the following INS definition as cited in *Diminich v. Esperdy*, 299 F.2d 244, 246 (2d Cir. 1961): "Physical persecution contemplates incarceration or subjection to corporal punishment, torture, or death based usually on one's race, religion, or political opinions."

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.⁹²

Applications under section 243(h) of the 1965 Act are held before an immigration judge in the context of deportation hearings. The burden is on the alien to prove eligibility under the statute. The alien is required to establish the likelihood of persecution under a clear probability standard,⁹³ a very strict burden of proof. Moreover, until the passage of the 1980 Act, even if the alien met this burden of proof, relief from deportation remained discretionary.⁹⁴

(d) Section 203(a)(7). This "conditional entry" provision, pertaining only to individuals outside the country, granted the Attorney General discretion to admit a limited number (six percent of the total number of immigrants admitted annually) of aliens fleeing from persecution or fear of persecution on account of race, religion, or political opinion from any Communist-dominated country or area, or from any country within the general area of the Middle East, or persons uprooted by catastrophic natural calamity.⁹⁵ Most refugees admitted under section 203(a)(7) entered not under individual determinations as under section 243(h), but under the parole programs authorized by section 212(d)(5) described above.⁹⁶

Prior to the passage of the 1980 Act, refugee admissions thus suffered from the inadequate provisions of earlier measures. Specific refugee relief measures were limited as to target group and periods of admission. Parole programs under section 212(d)(5) were discriminatory, highly influenced by Cold War policies, and ad hoc in nature. Section 243(h) procedures were discretionary and required the alien to meet a very strict standard of proof. Conditional entry programs were small and specifi-

92. 1965 Act, *supra* note 39, § 243(h), 79 Stat. 918.

93. *In re Tan*, 12 I. & N. Dec. 564 (1967); *Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), *cert denied*, 390 U.S. 1003 (1967); *Rosa v. INS*, 440 F.2d 100 (1st Cir. 1971); *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967); *Hamad v. INS*, 420 F.2d 645 (D.C. Cir. 1969); for a discussion of the clear probability standard, see *infra* notes 123-53 and accompanying text.

94. See, e.g., *United States ex rel. Leong Choy Moon v. Shaughnessy*, 218 F.2d 316, 318 (2d Cir. 1954); *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392, 294-95 (2d Cir. 1953). For a general review of deportation procedures under section 243(h), see Note, *The Right of Asylum*, *supra* note 82, at 1127-28. For an analysis of the effect of the 1967 Protocol on section 243(h) determinations in pre-1980 cases, see Frank, *Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States*, 11 INT'L LAW. 291 (1977).

95. 1965 Act, *supra* note 39, § 203(a)(7), 79 Stat. 913.

96. Weiss-Fagan, *supra* note 82, at 3.

cally ideologically oriented, as the enabling language attests. After accession to the Protocol in October of 1967, questions continued to arise as to whether the United States was meeting its Treaty obligations by implementing these measures.⁹⁷ These problems form a background for consideration of legislative intent behind the 1980 Act.

B. The 1980 Act: Legislative Intent⁹⁸

"In good measure, our country's humanitarian tradition of extending a welcome to the world's homeless has been accomplished in spite of, not because of our laws relating to refugees."⁹⁹

The congressional intent behind the 1980 Act was to establish a comprehensive refugee program which would apply to all refugees equally without the ideological and geographic limitations of earlier Acts.¹⁰⁰ Congress also intended to implement the humanitarian ideals and spirit of the Protocol,¹⁰¹ giving "statutory meaning to our national commitment to human rights and humanitarian concerns, not reflected in the Immigration and Nationality Act of 1952, as amended."¹⁰² Senator Kennedy, in initiating the draft bill in 1978, cited the "urgent need for the United States to begin to take the steps necessary to establish a long range refugee policy—a policy which will treat all refugees fairly and assist all refugees equally."¹⁰³ Testimony for the administration by Ambassador Dick Clark, United States Coordinator for Refugee Affairs, at a hearing held on the Bill in March 1979, addressed the need for a permanent and systematic procedure for refugee admission.¹⁰⁴ The intent of the drafters was to provide "a more rational, stable, and equitable federal policy for the admission of refugees to this country and for assist-

97. See *supra* note 59 and accompanying text.

98. For a thorough history of the various steps in the legislative formulation of the 1980 Act, see Anker & Posner, *supra* note 17.

99. *Hearings on H.R. 2816, supra* note 86, at 1 (introductory remarks by Congresswoman Elizabeth Holtzman). Representative Holtzman, Chairwoman of the House Judiciary Subcommittee on Immigration, Refugees, and International Law, was one of those who introduced the 1980 Refugee Act into Congress, along with Senator Edward Kennedy, Chairman of the Senate Judiciary Committee, and Representative Peter W. Rodino, Jr., Chairman of the House Judiciary Committee. CRS REFUGEE REPORT, *supra* note 5.

100. CRS REFUGEE REPORT, *supra* note 5.

101. *Id.*

102. S. REP. NO. 96-256, 96th Cong., 2d Sess. 1 (1979), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141 [hereinafter cited as S. REP. NO. 256].

103. Letters of Senator Kennedy to Secretary of State Cyrus Vance, Associate Attorney General Michael Egan, Secretary of Health, Education and Welfare Joseph Califano, and the Chairman of the American Council of Voluntary Agencies' Committee on Migration and Refugees (September 11, 1978), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141, 142-43.

104. *Id.* at 144.

ance to them within the United States"¹⁰⁵ and to substitute a humanitarian definition of refugee for an ideological one.¹⁰⁶

C. The 1980 Refugee Act: Key Provisions

The 1980 Act¹⁰⁷ amends the Immigration and Nationality Act of 1952 and the Migration and Refugee Assistance Act of 1962.¹⁰⁸ As stated in the Act, its purposes are: "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted."¹⁰⁹

Section 201 provides a new definition of "refugee" based on the 1967 Protocol, which is in turn derived from the 1951 Convention. Section 201 amends section 101(a) of the 1952 Act as follows:

The term "refugee" means . . . any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹¹⁰

This change in definition has two major effects. First, as Congress intended,¹¹¹ it brings the 1980 Act into full conformity with the UN definition of refugee.¹¹² Second, it broadens the class of people eligible for protection under the Act by adding two new categories to previous refu-

105. Testimony of former Secretary of State Cyrus Vance, H.R. REP. NO. 608, 96th Cong., 1st Sess. 6 (1979).

106. *Id.* at 9-10. See also testimony in CRS REFUGEE REPORT, *supra* note 5, at 10. *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977); *Hearings on H.R. 2816, supra* note 86, at 172.

107. 1980 Act, *supra* note 2, 94 Stat. 102.

108. *Id.*

109. *Id.* § 101(b), 94 Stat. 102.

110. *Id.* § 201, 94 Stat. 102-03.

111. S. REP. NO. 256, 96th Cong., 2d Sess. 4, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 144. See also H.R. REP. NO. 108, 96th Cong., 1st Sess. 9 (1979); S. REP. NO. 590, 96th Cong., 2d Sess. 19 (1980). Similar indications appear throughout the Act's legislative history. For more citations concerning the intended accord with the UN documents, see *Amicus Curiae* Brief of the United Nations High Commissioner for Refugees at 8 n.12, *Stevic v. INS*, 678 F.2d 401 (2d Cir. 1982), cert. granted 460 U.S. 1010 (1983) [hereinafter cited as *UNHCR Amicus Brief*].

112. See *supra* notes 47, 53 & 54 and accompanying text.

gee definitions: nationality and social group membership. The implications of this latter category are explored in the last section of this Note.¹¹³

Section 203(f)(3) amends the parole provision language of the 1965 Act to specify that parole admissions by the Attorney General be handled on a case-by-case basis.¹¹⁴

Section 207 of the 1980 Act establishes for the first time a general admissions quota for refugees (as distinct from immigrants). This includes an emergency provision which allows the President, after consultation with Congress, to admit refugees above the designated quota levels based on "grave humanitarian concerns" or other "national interest[s]."¹¹⁵

Section 208¹¹⁶ sets forth asylum procedures for certain aliens at "the discretion of the Attorney General if the Attorney General determines that such alien is a refugee" within the meaning of the definition established in section 201.¹¹⁷ Such asylum procedures did not form part of any previous legislation. Asylum is the process by which an alien already in the United States applies for refugee status.¹¹⁸ Section 208 provides that the burden of proof be placed on the alien applicant to establish his or her conformity with the Act's refugee definition.¹¹⁹ Regulations enacted pursuant to the Act mandate an advisory opinion from the Department of State's Bureau of Human Rights and Humanitarian Affairs (BHRHA) regarding each asylum applicant's claim of persecution, or well-founded fear of persecution, in his or her country of origin.¹²⁰ Asylum can be denied as a matter of discretion even if the applicant meets

113. See *infra* notes 193-216 and accompanying text.

114. 1980 Act, *supra* note 2, § 203(f)(3), 94 Stat. 108.

115. *Id.* § 207(b)(2), 94 Stat. 103. Between 1980 and 1982, the President was authorized to admit 50,000 refugees annually. For 1981, 1982, and 1983, refugee authorizations after consultation were 217,000, 140,000, and 90,000, respectively. Presidential Determinations No. 80-28, 82-1 and 83-2, cited in Note, *The Endless Debate: Refugee Law and Policy and the 1980 Refugee Act*, 32 CLEV. ST. L. REV. 117, 124 n.36 (1983-1984). For a breakdown by area, revealing a pattern similar to admissions under the pre-1980 parole admissions program (*supra* note 87 and accompanying text), see *id.* at 126 n.44. In fiscal year 1984, the 72,000 ceiling for refugee admissions under section 207 was allocated as follows: 50,000 for East Asia; 12,000 for the Soviet Union/Eastern Europe; 6,000 for the Near East/South Asia; 3,000 for Africa; and 1,000 for Latin America/Caribbean. Presidential Determination No. 83-11 (Oct. 7, 1983), cited in Blum, *The Half Open Door: U.S. Refugee Law and the Stevic Case*, 31 FED. B. NEWS & J. 198, 201 n.16 (1984).

116. 1980 Act, *supra* note 2, § 208, 94 Stat. 105.

117. *Id.* § 208(a), 94 Stat. 105.

118. *Id.*

119. 8 C.F.R. § 208.5 (1982).

120. *Id.* § 208.7.

the definition of refugee.¹²¹ However, the alien's failure to meet the Act's refugee definition necessarily results in the denial of asylum.¹²²

An alien whose request for asylum is denied under these procedures can still apply for relief from exclusion or deportation¹²³ under section 243(h) of the 1965 Immigrations and Nationality Act, as amended by the 1980 Act. Under such circumstances, the BHRHA advisory opinion is incorporated into the proceeding.¹²⁴

Section 243(h) is amended as follows: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."¹²⁵ This amended version embodies two significant changes. First, the withholding of deportation is no longer discretionary but mandatory once the requisite conditions are met; that is, once the Attorney General determines that the alien would be persecuted in the destination state on account of one of the five enunciated categories creating refugee status. Section 243(h) is thus theoretically brought into conformity with Article 33 of the 1951 Convention and 1967 Protocol.¹²⁶ It is crucial to note, however, that in the revised section 243(h), the Attorney General retains the discretion to determine the likelihood of persecution: a threshold inquiry for creating access to the section's mandatory protection. Second, by adding the definitional criteria of nationality and membership in a social group, the section

121. *Id.* § 208.8(a). Requests for asylum are made to the District Director, an INS official, with no right of appeal. *Id.* § 208.8(c). If, however, deportation or exclusion proceedings have begun, or are initiated as a result of such determination, asylum requests are made to an immigration judge, also an INS official. *Id.* §§ 208.3(b), 208.9. Appeal from such proceedings may be made to the Board of Immigration Appeals (BIA), a division of the Department of Justice. *Id.* § 242.21. Appeals from final orders of deportation are made to the U.S. Courts of Appeals. 8 U.S.C. § 1105(a) (1976).

122. 8 C.F.R. § 208.8(f)(i) (1982).

123. Aliens subject to deportation are those physically present in the United States who have either been inspected by an immigration officer or have intentionally evaded such inspection. Aliens subject to exclusion may be present in the United States but are stopped at the port of entry. Formerly, only deportable aliens were eligible to apply for relief under section 243(h). *In re Pierre*, 14 I. & N. Dec. 467, 470 (1973). Under the 1980 Act, this distinction is moot since both classes of aliens may apply for relief under section 243(h). *In re Lam*, 18 I. & N. Dec. 15, 17-18 (1981). See generally Note, *Those Who Stand at the Door*, *supra* note 82, at 395, 408 n.88; Note, *The Right of Asylum Under United States Immigration Law*, *supra* note 90, at 546 nn.48-49.

124. 8 C.F.R. § 208.10 (1982).

125. 1980 Act, *supra* note 2, §§ 203(e), 203(h)(1), 94 Stat. 107.

126. See *supra* note 50 and accompanying text.

243(h) grounds for withholding deportation are broadened, at least in theory.

In summary, under the 1980 Act an alien can apply for admission as a refugee under section 207 of the Act if outside of the country, or as an asylee under section 208 of the Act if within the country or at the border. If subject to exclusion or deportation hearings, an alien can apply for a withholding of deportation under amended section 243(h). This application is treated procedurally like a request for asylum.

D. Problems in Application of the 1980 Act

1. The Evidentiary Standard

A major problem in the application of the 1980 Act has been the retention of a pre-1980 evidentiary standard. As noted above, the alien has always had the burden of proving a likelihood of individual persecution.¹²⁷ Prior to 1980, the standard of proof required a showing of a clear probability of persecution supported by convincing evidence.¹²⁸ In applying this standard, the immigration judge looked first at whether the applicant had previously suffered any persecution in his country of origin.¹²⁹ The court then looked at prior political activity in the country of origin.¹³⁰ Political activity occurring after the alien entered the United States was not considered sufficient evidence.¹³¹ Motivation for fleeing the country of origin was also considered.¹³² Generally, the persecution had to flow from the government of the alien's country of origin. If the source of persecution was non-governmental, the applicant had to prove that the government was unable or unwilling to prevent such non-governmental persecution.¹³³ Under the clear probability standard, the applicant for section 243(h) relief from deportation faces a dual burden of proof: (1) that there is a clear probability of persecution upon deportation; and (2) that persecution would be specifically directed towards the

127. *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971); *Hamad v. INS*, 420 F.2d 645, 647 (D.C. Cir. 1969); *Cheng Kai Fu v. INS*, 386 F.2d 751, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536, 538 (7th Cir. 1967); *In re Tan*, 12 I. & N. Dec. 564, 568 (1967).

128. *See, e.g., Tan*, 12 I. & N. Dec. at 568.

129. *Id.*

130. *In re Rodriguez-Palma*, 17 I. & N. Dec. 465, 469-70 (1980).

131. *Cisternas-Estay v. INS*, 531 F.2d 155 (3d Cir 1976), *cert. denied*, 429 U.S. 853 (1976).

132. *Paul v. INS*, 521 F.2d 194, 196, 199 (5th Cir. 1975).

133. *See Wildes, Dilemma of the Refugee: His Standard for Relief*, 4 CARDOZO L. REV. 353, 361 (1983); Note, *Section 243(h) of the Immigration and Nationality Act of 1952 as Amended by the Refugee Act of 1980: A Prognosis and a Proposal*, 13 CORNELL INT'L L.J. 291, 298-300 (1980).

individual applicant.¹³⁴

In re Dunar,¹³⁵ concerned a pre-1980 section 243(h) withholding of deportation hearing before the Immigration and Naturalization Service. In *Dunar* it was contended that a "well-founded fear" standard (based on the Protocol definition of refugee)¹³⁶ should be substituted for the traditional requirement of clear probability in section 243(h) hearings. In rejecting this argument, the Board of Immigration Appeals specifically considered the effect of the United States accession to the Protocol, and reasoned that where Congress had provided that existing administrative procedures would remain intact, the clear probability standard was proper.¹³⁷ In *Kashani v. INS*,¹³⁸ another pre-1980 case, the Seventh Circuit Court of Appeals considered whether the clear probability standard had been changed by the "well-founded fear" language of the Protocol and decided that there was little to distinguish the two standards.¹³⁹

After 1980, as noted above, aliens could apply for asylum under section 208 by meeting the Act's new definition of refugee. To meet this definition, the alien need only satisfy a "well-founded fear" standard. This, however, merely renders the applicant eligible for discretionary relief. Once the applicant is found eligible for such relief, the alien can make a section 243(h) claim.¹⁴⁰ Immigration courts continued to apply a clear probability standard to post-1980 section 243(h) claims. In *In re McMullin*,¹⁴¹ the immigration court held that Congress did not intend the Refugee Act to change the application of section 243(h).¹⁴² In 1982, however, a key Second Circuit case, *Stevic v. INS*,¹⁴³ held that the evidentiary standard of section 243(h) had been changed due to the "well-founded fear" language of the 1980 Act, making the clear probability test no longer applicable.¹⁴⁴ The Second Circuit did not specify what standard should apply, but rather it left the actual formulation of a new stan-

134. *Tan*, 12 I. & N. Dec. at 568.

135. 14 I. & N. Dec. 310 (1973).

136. *See supra* notes 45, 54 and accompanying text.

137. *Dunar*, 14 I. & N. Dec. at 319-20. For the view that nothing in the legislative history indicates Senate approval of a clear probability standard, but instead suggests a desire to conform to the Protocol in the application of a standard of proof, see UNHCR *Amicus Brief*, *supra* note 111, at 8.

138. 547 F.2d 376 (7th Cir. 1977).

139. *Id.* at 379. *See also* *Coriolan v. INS*, 559 F.2d 993, 996-97 (5th Cir. 1977).

140. *See supra* notes 121-31 and accompanying text.

141. 17 I. & N. Dec. 542 (1980), *rev'd*, 658 F.2d 1312 (9th Cir.1981).

142. *McMullin*, 17 I. & N. Dec. at 545.

143. 678 F.2d 401 (2d Cir. 1982), *rev'd*, 104 S. Ct. 2481 (1984).

144. *Id.* at 405-08.

dard to the administrative agency.¹⁴⁵ In accord with the *Stevic* court, the Sixth Circuit in *Reyes v. INS*¹⁴⁶ called for a new standard based on the 1980 Act.¹⁴⁷ In *Rejaie v. INS*, the Third Circuit, in direct conflict with the *Stevic* and *Reyes* opinions, held that the 1980 Act did not mandate change in the section 243(h) procedures.¹⁴⁸ The conflict has apparently been resolved by the Supreme Court which reversed the Second Circuit in *Stevic*¹⁴⁹ and held that an alien attempting to avoid deportation must continue to establish a clear probability of persecution in a withholding of deportation claim under section 243(h) of the 1980 Act.¹⁵⁰ The Court relied in part on the fact that the text of the amended section 243(h) neither specified the applicable standard nor referred to the section of the Act containing the refugee definition with its "well-founded fear" language.¹⁵¹ Since it could find no legislative intent to alter pre-existing practices, the Court stated that the clear probability standard continued to apply in section 243(h) actions¹⁵² once deportation procedures have been initiated.¹⁵³ The Supreme Court decision, however, did not address the standard of proof requirement in asylum claims initiated under section 208.¹⁵⁴

2. Discriminatory Application of the 1980 Act

Numerous commentators have pointed to the political, ideological, racial, and ethnic considerations that continue to dominate INS decisions despite the passage of the 1980 Act and the intent of its framers.¹⁵⁵ Thus, refugees from non-Communist countries, particularly in this hemisphere, have considerable difficulty in establishing asylum claims.¹⁵⁶

145. *Id.* at 409.

146. 693 F.2d 597 (6th Cir. 1982).

147. *Id.* at 600.

148. *Rejaie v. INS*, 691 F.2d 139, 146 (3d Cir. 1982).

149. *Stevic*, 104 S. Ct. at 2481.

150. *Id.* at 2492.

151. *Id.* at 2496-98.

152. *Id.* at 2501.

153. *Id.* at 2500-01.

154. The standard of proof in a section 208 action, as compared to a section 243(h) action, is at issue in *Cardozo-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985), *petition for cert. filed* (Nov. 5, 1985) (No. 83-7761).

155. See, e.g., Scanlon, *supra* note 4, at 618, 628-29; Note, *The Right of Asylum*, *supra* note 82, at 1132-33.

156. See, e.g., the series of cases dealing with Haitian refugees: *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982); *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977); *Pierre v. United States*, 547 F.2d 1281 (5th Cir. 1977), *vacated and remanded*, 434 U.S. 962 (1977); *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

Haitian and Cuban refugees arriving at the same time on the same shores were accorded a dramatic difference in treatment.¹⁵⁷ As noted, the processing of all asylum claims includes a mandatory "advisory" opinion from the State Department Bureau of Human Rights and Humanitarian Affairs (BHRHA). State Department recommendations are admitted as adjudicated facts in subsequent deportation proceedings, a practice that has been criticized at the appellate level¹⁵⁸ but not barred. An example of the ideological bias of these advisory opinions is found in the fact that all asylum requests from Poland are given automatic substantiation by State Department advisory opinions, whereas no asylum applicants from El Salvador were approved by the State Department as of mid-1980.¹⁵⁹

3. Administrative Backlog

The 1980 Act envisioned the admission of 50,000 asylees annually.¹⁶⁰ Over 19,000 asylum claims were pending as of November 30, 1979.¹⁶¹ In 1980, 130,000 Cubans, 11,000 Haitians,¹⁶² and approximately 15,000 Salvadorans, Ethiopians, Iranians, and Nicaraguans¹⁶³ entered the United States as potential asylum seekers. A projected total figure of 45,000-50,000 asylees per year is estimated.¹⁶⁴ It is apparent from these figures that severe bureaucratic and administrative problems are created by the volume of claims and potential claims. The resulting administrative backlog can itself be the cause of undue delay and even denial of basic rights when applicants are involuntarily detained. At

See generally Note, *An Analysis of Haitian Requests for Political Asylum After Haitian Refugee Center v. Civiletti*, 33 HASTINGS L.J. 1501 (1982) [hereinafter cited as Note, *An Analysis of Haitian Requests*]. For treatment of Ethiopian refugees, see Martin, *Non-Refoulement of Refugees: United States Compliance with International Obligations*, 23 HARV. INT'L L.J. 357, 377-79 (1983).

157. See, e.g., Note, *Refugee Act of 1980 and the "Cuban-Haitian Entrants"—Status Pending?*, 5 SUFFOLK TRANSNAT'L L.J. 212 (1981); Note, *Political Asylum for the Haitians?*, 14 CASE W. RES. J. INT'L L. 155 (1982); Tompkin, *Criminal at the Gate: A Case for the Haitian Refugee*, 7 BLACK L.J. 387, 405-07 (1981). See also Note, *An Analysis of Haitian Requests*, *supra* note 156, at 1512-13 n.91.

158. 8 C.F.R. § 208.7 (1982). See, e.g., *Zamora v. INS*, 534 F.2d 1055, 1060 (2d Cir. 1976); *Kasravi v. INS*, 400 F.2d 675, 676-77 (9th Cir. 1977).

159. Interviews conducted with INS officials by Gracie Berg and with State Department officials by Gilbert Loesch, reported in Scanlon, *supra* note 4, at 629 nn. 101-02.

160. Act of 1980, *supra* note 2, § 207(b), 94 Stat. 103.

161. Interview with State Department official by John Scanlon, reported in Scanlon, *supra* note 4, at 627 n.84.

162. *Id.*

163. *Id.*

164. *Id.*

least one court has held that such indefinite incarceration is illegal.¹⁶⁵

In summary, the 1980 Act grew out of a background of prior legislative enactments, ad hoc in nature, which attempted to deal with special refugee problems arising out of World War II and its aftermath, but which were almost immediately transformed into instruments of Cold War policies. The 1980 Act was framed in a spirit of subordinating these ideological constraints to a more nonpartisan and humanitarian approach to the ever-growing world-wide refugee problem. This new approach was symbolized, and theoretically effectuated, by the adoption of the United Nations definition of refugee as enunciated in the 1951 Convention and the 1967 Protocol. Unfortunately, the 1980 Act has thus far failed to bring significant change to the actual United States policy toward the admission of refugees, due largely to procedural mechanisms in the Act which incorporate earlier burden of proof requirements and which give the Department of State "advisory opinions" undue weight. An illustration of this failure is the treatment of refugees from El Salvador.

V. SALVADORAN REFUGEES: DEFINITION OF THE PROBLEM AND SUGGESTED RESOLUTION UNDER THE TERMS OF THE 1980 ACT

A. Salvadoran Refugees

The ever increasing number of human rights violations in El Salvador, stemming largely from activities of government security forces in El Salvador, has been reported by many reputable sources.¹⁶⁶ These reports

165. *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd in Rodriguez-Fernandez v. INS*, 654 F.2d 1382 (10th Cir. 1981).

166. *See, e.g., AMERICAN WATCH COMMITTEE & THE AMERICAN CIVIL LIBERTIES UNION, REPORT ON HUMAN RIGHTS IN EL SALVADOR* (3d Supp. July 19, 1983).

Tutela Legal, the human rights monitoring office of the Archdiocese of San Salvador, tabulated 2,527 murders of civilian noncombatants by government security forces and paramilitary forces allied with them during the first six months of 1983, an increase from the 2,340 such murders recorded by Tutela Legal during the last six months of 1982. In addition, Tutela Legal tabulated 326 disappearances after violent abductions by the security forces during the first six months of 1983, an increase from the 260 such disappearances recorded by Tutela Legal during the last six months of 1982.

Since those who do not reappear within 15 days after they have been abducted violently by the security forces must be presumed to have been killed, the figures for murders of civilian noncombatants and those for disappearances of civilian noncombatants should be combined. The combined figure for the first six months of 1983 is 2,853, up from the 2,600 during the last six months of 1982. *Id.* at 5. The Fourth and Fifth Supplements (January 1984 and August 1984) of this same publication continue to document human rights abuses in El Salvador.

See also United Nations Economic and Social Council, *Interim Report on the Situation of*

characteristically testify not only to the ever increasing number of such violations but also to the almost unbelievable savagery with which they are carried out.¹⁶⁷ Numerous personal accounts of unbearable intensity have been documented.¹⁶⁸

The position of the United Nations on refugees from El Salvador is clear: The Legal Advisor to the UNHCR Washington Liaison Office has stated that "[p]ersons leaving or finding themselves outside that country [El Salvador] due to the present situation should be considered *prima facie* refugees and should, in any event not be obliged to return directly or indirectly to El Salvador."¹⁶⁹ *Prima facie* or "mandate"¹⁷⁰ refugee determination is used "in cases of sudden, large-scale influx, or where it was otherwise impractical to determine the status of asylum-seekers individually"¹⁷¹ and is based on "(1) the existence of an *objective situation* in the country of origin, i.e. the element of persecution, and (2) a presumption that the *subjective element*, i.e., fear of persecution, is also present."¹⁷²

What is the effect of such mandate status determination on an individual seeking refuge/asylum under United States law? As indicated above, the UNHCR has moral, but not legally binding force over signatories of the 1967 Protocol.¹⁷³ All signatories to the Protocol, however, do bind themselves to Article 33 of that instrument, and the UNHCR, as enunciated above, has indicated that the *non-refoulement* provisions of that Article should apply to Salvadoran refugees under its mandate protection.¹⁷⁴ On the other hand, given that such determinations are not individually based, and that mandate protection is also extended to those

Human Rights and Fundamental Freedoms in El Salvador Prepared by the Special Representative of the Commission on Human Rights, U.N. Doc. A/36/608 (1981).

167. For a three-page summary source listing of materials describing conditions in El Salvador, see ACLU PUBLIC POLICY REPORT No. 1, SALVADORANS IN THE UNITED STATES, app. 1 (Dec. 1983).

168. For first hand accounts, see AMERICANS WATCH COMMITTEE AND AMERICAN CIVIL LIBERTIES UNION, REPORT ON HUMAN RIGHTS IN EL SALVADOR (Jan. 1982 & Supps. July 1982, Jan. 1983, July 1983).

169. Letter from Kallu Kalumaya, Legal Advisor, UNHCR, Washington Liaison Office (Oct. 21, 1981).

170. Mandate refugees are those coming under the protection and good offices of the UNHCR. See *supra* notes 66-72, 74-88 and accompanying text. See also UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 3-6 (Geneva 1979) [hereinafter cited as UNHCR HANDBOOK].

171. UNHCR Advisory Letter, *supra* note 60, at 2.

172. *Id.*

173. See *supra* notes 64-65 and accompanying text.

174. See *supra* note 169 and accompanying text.

not meeting the classic refugee definition,¹⁷⁵ the legal effects of such mandate designation on actual Salvadoran refugee claims in the United States are questionable at this time.¹⁷⁶

An evaluation of the recent history of Salvadorans in the United States shows that the legal effect of the UNHCR mandate status afforded Salvadoran refugees is unclear. The UNHCR Mission to Monitor INS Asylum Processing of Salvador Illegal Entrants reported the following in its September 1981 summary findings:

1. Large numbers of Salvadorans continue to enter the U.S. illegally on a regular basis and this was seen to have a direct causal relationship with the internal strife in El Salvador.

. . . .

3. Though in theory any Salvadoran illegal entrant may apply for asylum, there appears to be a systematic practice designed to secure the return of Salvadorans, irrespective of the merits of their asylum claims. Hence the overwhelming majority of those returning are doing so "voluntarily" without apparently being freely advised of their asylum rights.

4. According to INS Headquarters, during Fiscal Year 1981 (Oct. 1980-Sept. 1981) only one Salvadoran was granted asylum in the U.S. and none had been allowed to stay even temporarily in the country for humanitarian reasons.

5. This would appear to be the result of a deliberate policy established by the U.S. authorities in Washington and not the result of individual INS judgment in the field.¹⁷⁷

The authors of the report conclude that the failure of the United States "to grant asylum to any significant number of Salvadorans, coupled with continuing large scale forcible and voluntary return to El Salvador, would appear to represent a negation of its responsibilities assumed upon its adherence to the Protocol."¹⁷⁸ In other words, as of the 1981 UNHCR Special Report, the United States is not in compliance with the UN Protocol by virtue of its treatment of Salvadoran refugees.

A recent study (December 1983) reveals that an estimated 300,000-500,000 Salvadorans currently reside in the United States; at least half of

175. *Moussalli Interview*, *supra* note 60, at 42-43.

176. C. Blum, Staff Attorney, International Institute of the East Bay, Adjunct Professor of Immigration Law, Boalt Hall, University of California at Berkeley, Unpublished Memorandum on the Role of the UNHCR in Adjudication of Asylum Claims of Salvadorans in the United States (no date).

177. 128 CONG. REC. S827-31 (daily ed. Feb. 11, 1982) (as read into the record at the request of Senator Edward M. Kennedy).

178. *Id.*

these people have arrived since 1980.¹⁷⁹ There have been approximately 25,000 asylum claims during that period from this group.¹⁸⁰ In fiscal year 1982, 2118 Salvadorans were deported back to El Salvador.¹⁸¹ In the period from May 1982 to May 1983, 1627 Salvadorans agreed to "voluntary departure" upon detention, and deportation proceedings were initiated against approximately 10,000 others.¹⁸² In the first three months of 1983, 31 Salvadorans were granted asylum while 1426 had their asylum claims denied.¹⁸³ In fiscal year 1984, 328 Salvadoran asylum requests were granted and 13,045 such requests were denied. These figures show that 2.28% of asylum requests from Salvadoran nationals were granted in fiscal year 1984, as compared with an average of 30% of asylum claims granted for all other nationalities.¹⁸⁴

While these figures show a slight increase over the one asylum claim granted in fiscal year 1981 and the granting of no asylum claims before mid-1980,¹⁸⁵ they also point to a continued pattern of denial of asylum to Salvadoran nationals. In addition, the question of whether those who agreed to voluntary departure were adequately informed of their right to apply for asylum must be raised.¹⁸⁶ While little information is available on the fate of Salvadorans who are returned to their country,¹⁸⁷ it seems highly likely that, as in the case of Haitian deportations,¹⁸⁸ a pattern of persecution might be triggered by illegal departure from the original country or by application for asylum while in the United States.

B. Suggested Resolution of Salvadoran Refugees Determinations, Based on the 1980 Refugee Act

As the above figures indicate, it has been almost impossible for Salvadorans to meet the standards governing the determination of asylum claims initiated under either section 208 of the 1980 Refugee Act or

179. ACLU PUBLIC POLICY REPORT No. 1, *supra* note 167, at 3-4.

180. *Id.* at 3.

181. *Id.*

182. *Id.* at 4.

183. *Id.*

184. Figures compiled by ACLU Asylum Project, Washington, D.C. from INS Statistics.

185. See *supra* notes 159, 177 and accompanying text.

186. See *supra* note 177 and accompanying text. See also *Orantes Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982); *Nunez v. Boldin*, 537 F. Supp. 578 (S.D. Tex. 1982) (both cases finding that Salvadoran nationals are being coerced into signing voluntary departure forms and are not being advised of the right to apply for asylum and stay of deportation).

187. ACLU PUBLIC POLICY REPORT No. 1, *supra* note 167, has documented six cases of murderous reprisals, including decapitation, against returning Salvadorans. *Id.* at app. III.

188. *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 477-78, 480-82 (S.D. Fla. 1980), *aff'd as modified sub nom Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

requests for the withholding of deportation under section 243(h). Routinely adverse BHRHA opinions based on foreign policy considerations as well as the discretionary nature of the relief afforded under section 208 serve to keep the number of favorable determinations for Salvadoran refugees to a minimum. Stringent burden of proof requirements preclude the granting of relief to most Salvadorans in section 243(h) proceedings. For Salvadoran refugees located outside the borders of the United States, the chance of gaining admission under section 207 is exceedingly slim. As noted, the number and allocation of such admissions are determined at the executive level in consultation with Congress.¹⁸⁹ Allocations since the passage of the 1980 Act reflect the persistence of pre-1980 ideological constraints.¹⁹⁰ In fiscal year 1984, only 1000 out of 72,000 refugee admissions were allocated to all of Central America and the Caribbean.¹⁹¹ That same year, El Salvador had the fifth largest refugee population in the world.¹⁹²

To date, Salvadoran applications for asylum have fallen into the category of political asylum requests. These requests are routinely being denied under the procedures outlined above. It is the suggestion of this Note that a more favorable outcome to Salvadoran asylum claims may emerge from the use, in asylum proceedings, of the "membership in a particular social group" category, a key part of the statutory definition of refugee under the 1951 Convention and the 1967 Protocol and incorporated in relevant part in section 208 and section 243(h) of the 1980 Act.¹⁹³ While largely overlooked by both commentators and the courts, a membership-in-a-social-group approach to section 243(h) hearings, although posing new legal problems, could serve to mitigate the strict burden of proof requirements currently imposed by the *Stevic* decision.¹⁹⁴

The term "membership in a particular social group" was included in the original 1951 Convention definition as a result of an amendment to the original Draft Convention definition in Article I(A)(2).¹⁹⁵ The Swedish delegate who introduced the definitional phrase argued that "experience has shown that certain refugees have been persecuted because they belong to particular social groups" and that a provision to cover these

189. See *supra* note 115 and accompanying text.

190. *Id.*

191. *Id.*

192. *Id.*

193. See Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39 (1983).

194. See *supra* notes 149-53 and accompanying text.

195. G.A. Res. 429, *supra* note 44.

groups should accordingly be included.¹⁹⁶ The Amendment was unanimously adopted without definition or further comment on July 20, 1951.¹⁹⁷

At least one writer contends that the term was intended to cover those who were persecuted for their social origins, with an eye to those who were believed to be so persecuted in Eastern Europe.¹⁹⁸ However, international commentators have emphasized a more expansive use of the term. Professor A. Grahl-Madsen, an international authority on asylum matters, suggests a "liberal interpretation" of the clause, stating that "[w]henever a person is likely to suffer because of his background, he should get the benefit of the present provision."¹⁹⁹ As applied in international law, the concept has been broadly construed, originally in the context of the supposedly anti-Communist intent of the framer of the term.²⁰⁰ The *UNHCR Handbook on Procedure and Criteria for Determining Refugee Status (Handbook)* was published in 1979 to aid government officials, lawyers, groups, and individuals in making refugee determinations²⁰¹ and has been used since its publication by the Board of Immigration Appeals as authority in certain cases.²⁰² The *Handbook* devotes three paragraphs to defining the phrase:

77. A 'particular social group' normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion, or nationality.

78. Membership in such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government, or because the political outlook, antecedents, or eco-

196. U.N. Doc. A/Conf. 2/1 (1951); U.N. Doc. A/Conf. 2/SR. 3 at 19 (1951).

197. U.N. Doc. A/Conf. 2/SR. 29 at 5 (1951).

198. Plender, *supra* note 62, at 52.

199. A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 220 (Leyden 1966). See also, S. SINHA, *ASYLUM AND INTERNATIONAL LAW* 103 (1971); Weiss, *The Concept of the Refugee in International Law*, 87 JOURNAL DE DROIT INTERNATIONAL 928, 964 (1960); Shimada, *The Concept of Political Refugee in International Law*, 19 JAPANESE ANN. INT'L L. 24, 33 (1975); Fragomen, *The Refugee: A Problem of Definition*, 3 CASE W. RES. J. INT'L L. 43, 48 (1978).

200. See A. GRAHL-MADSEN, *supra* note 199, at 219-20.

201. UNHCR Advisory Letter, *supra* note 60, at 1. The *Handbook* is "meant for the guidance of government officials concerned with the determination of refugee status in various contracting states." UNHCR HANDBOOK, *supra* note 170, Preface.

202. See, e.g., *Stevic v. INS*, 678 F.2d at 406; *In re Rodriguez-Palma*, 17 I. & N. Dec. 465, 468 (1980); see also Helton, *supra* note 193, at 50 n.79 (citing a memorandum from the Office of the Legal Counsel to the General Counsel of the INS and urging acceptance of the guidelines in the *Handbook* as an aid to the construction of the Act). See also *Refugee Admission Proposal: Hearing Before the House Committee on the Judiciary*, 97th Cong., 1st Sess. 15 (1981) (statement of Doris M. Meissner, Acting Commissioner, INS).

nomic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policy.

79. Mere membership in a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.²⁰³

Each of these three paragraphs suggests a particular problem that will no doubt be the subject of future litigation if membership cases are brought before the courts. Paragraph 77 discusses how a social group might be defined. Paragraph 78 suggests how a persecution claim of a defined social group may be established. Paragraph 79 states that mere membership in the social group may be sufficient under "special circumstances" to establish a persecution claim, while an individualized showing of fear of persecution is generally required.

The membership in a social group category has not previously been litigated in United States courts, despite its inclusion in the 1980 Refugee Act and the 1967 Protocol to which the United States adhered in November 1968. In a recent INS test case, *In re Escobar Nieto & Sanchez Trujillo*,²⁰⁴ currently pending before the Board of Immigration Appeals, the membership in a social group theory is being used as a basis for an asylum claim.²⁰⁵ Respondents in that case argue that urban working class Salvadoran males between the ages of eighteen and thirty form a distinct and legally cognizable group subject to persecution on the basis of their non-participation in the military and the attendant imputed political opinion of guerrilla sympathy.²⁰⁶ While the immigration judge took judicial notice of the violence and terror historically prevalent in Salvadoran society,²⁰⁷ he denied the claim,²⁰⁸ insisting that "[t]he probability of persecution on account of race, religion, political opinion or membership in a particular social group must be based on a determination of the individual's experience, the individual's background, the individual's activities and the individual's opinions."²⁰⁹ He also summarily questioned whether the social group of urban working class males

203. UNHCR HANDBOOK, *supra* note 170, paras. 77-79.

204. *In re Escobar Nieto & Sanchez Trujillo*, File Nos. A24 235 796 and A24 224 793 (B.I.A. 1983).

205. *Id.*, Respondents' Brief in Support of Appeal to the Board of Immigration Appeals from Denial of Request for Asylum and Withholding of Deportation, at 2.

206. *Id.* at 36-38.

207. *In re Escobar Nieto & Sanchez Trujillo*, Decision of Brian Simpson, Immigration Judge, at 10-17.

208. *Id.* at 43.

209. *Id.* at 40.

constituted a legally cognizable group.²¹⁰

An earlier case, *In re Martinez-Romero*,²¹¹ indirectly considered membership in a social group in addressing the claim of a Salvadoran student claiming fear of persecution because students as a class were subject to persecution in El Salvador. The Bureau of Immigration Appeals rejected the claim, basing its decision on lack of evidence "that the respondent would be persecuted for her political beliefs or for her former student classification."²¹²

Together these two cases raise the three issues presented by the UNHCR definitional material regarding membership in a social group: definition of social groups; evidence of group persecution; and individualized burden of proof requirements. This convergence suggests that these same issues will arise in any case using the membership in a social group theory to support a refugee claim. The remaining portion of this Note discusses each of these issues in turn and suggests arguments and procedural reforms that might maximize the possibility that Salvadorans will be granted refugee status in INS proceedings.

1. How Can a Social Group Be Defined for Purposes of the Act?

The term "social group" represents a highly elastic concept. A social group may be analyzed in a statistical, societal, social, or associational context.²¹³ A recent study has considered the use of the term generally in international practice with reference to UN documents, among signatories to the refugee Convention and Protocol, and in a domestic legal context.²¹⁴ No single definition emerges from international practice.²¹⁵ In the United States, the term "social group" emerges in a variety of legal contexts²¹⁶ including equal protection.²¹⁷ Again, no single definition of the term emerges.

The purpose of this analysis is not to formulate an all-inclusive definition of a social group, but to present a paradigm to support the claims of asylum applicants under the Act. This Note, therefore, suggests the

210. *Id.* at 30-32.

211. 18 I. & N. Dec. 75 (1981), *aff'd. in* *Martinez-Romero v. INS*, 652 F.2d 595 (9th Cir. 1982).

212. *Id.* at 79.

213. Helton, *supra* note 193, at 51.

214. *See generally id.*

215. *Id.* at 46.

216. *Id.* at 48-52.

217. *Id.* at 48.

use of an occupational classification as one means of establishing a membership claim under current law.

A social group based on occupational criteria certainly falls within the parameters of the use of the term in sociological literature.²¹⁸ Distinctions based on occupation have had determinative impact since the inception of immigration restrictions under the 1917 Act.²¹⁹ In addition, immigration judges have already taken notice of occupationally defined groups currently at risk in El Salvador because of imputed anti-government sentiment or guerrilla sympathies. Groups mentioned include clergy, teachers, social workers, trade unionist, and students.²²⁰ While defining a social group by occupation does not exhaust the meaning of the term, such a definition could serve as a practical framework for litigating membership claims and for resolving some important procedural and legal issues. The advantage of an occupationally-based definition lies in its limited and clearly delineated contours, and in its susceptibility to certain evidentiary requirements at the proof stage of asylum proceedings.

2. How Can a Persecution Claim for an Occupationally Defined Social Group Be Established?

The *Handbook* definition contained in paragraph 77²²¹ suggests that imputed anti-government political sentiments and activity may form the basis of persecution of all members of a group regardless of the beliefs or activities of any individual member. Analytically, the evidentiary question in a membership case becomes not individual experience, background, activity, or opinion, but rather the group experience of persecution.

The *Stevic* case firmly established a clear probability standard of proof as to the likelihood of persecution in a section 243(h) proceeding.²²² Under the clear probability standard, the applicant for relief faces a dual burden of proof: that there is a clear probability of persecution upon deportation; and that the persecution would be specifically directed toward the individual applicant.²²³ How this burden would be met by occupationally defined social groups is discussed below.

218. *Id.* at 51.

219. 1917 Act, *supra* note 6, 66 Stat. 876-77.

220. Decision of the Immigration Judge, *supra* note 207, at 21-23. *Cf. In re Martinez-Romero*, 18 I. & N. Dec. 75 (1981) (claim of fear of persecution based on student classification rejected).

221. See *supra* note 203 and accompanying text.

222. See *supra* note 149-53 and accompanying text.

223. See *supra* note 134 and accompanying text.

Under current procedures, State Department input, purportedly based on area profiles, and conclusory in form, is generally used in any attempt to establish the "likelihood of persecution" claim. These reports should be replaced by a statistically based occupational profile in all group membership proceedings. These profiles, updated regularly, would be a matter of public record. They would detail killings, imprisonments, disappearances, deprivations of property, jobs, job rights, civil rights, and present other statistically relevant data concerning occupational groups claimed to be at risk. At least one author has suggested that such procedures could be used to formalize a legal presumption about the general validity of asylum claims lodged by members of a particular group.²²⁴ Furthermore, a non-State Department source could be used to generate and maintain such data, using input not just from the State Department, but also from international trade and occupational associations, national and international human rights organizations, and other relevant sources. In short, a clear probability of persecution based on statistical evidence gathered in public records would seem to be highly probative in a claim based on membership in a social group, particularly where the social group is delineated by occupation.

3. Is Mere Membership in an Occupationally Defined Social Group Sufficient to Establish a Persecution Claim, or Is an Individualized Showing of Persecution Required?

Under paragraph 78 of the *Handbook*, mere membership in a social group is not generally sufficient to establish a refugee claim, absent special circumstances.²²⁵ Further, the clear probability standard has traditionally meant that the applicant in a section 243(h) proceeding has to show an individualized threat of persecution. Both of these requirements would undergo change in a social group persecution claim based on occupation.

It is argued that the statistical evidence used to establish a group persecution claim as outlined above would constitute the special circumstances exception to the mere membership prohibition under the UNHCR definitional standard. Additional support for an occupationally defined membership claim could be provided where a *prima facie* group refugee determination has been made by the UNHCR, as is the

224. Scanlon, *Report Submitted to Select Commission on Immigration and Refugee Policy* (Sept. 23, 1980), in *STAFF REPORT OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY*, app. C, 50, 51 (1980).

225. See *supra* note 203 and accompanying text.

case for Salvadoran refugees.²²⁶ Such mandate determination could lend additional weight to a special circumstances exception to the mere membership prohibition, since such a designation is dependent upon the objective fact of persecution in the country of origin as well as upon the subjective fear of the refugee.²²⁷

Throughout the history of refugee adjudications in the United States, there has been a consistent pattern of individualized burden of proof in persecution claims under section 243(h) of both the 1952 and 1965 Acts and under section 243(h) and section 208 of the 1980 Act.²²⁸ Balanced against this pattern is the equally well-established principle of large scale refugee admissions under the parole programs discussed above,²²⁹ programs that Congress sought to curb under the 1980 Act²³⁰ but with only limited success, as the Cuban and Haitian refugee crises demonstrated.

In a section 243(h) proceeding, the applicant must demonstrate a clear probability of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. It can be argued that the only category which in itself would seem to require an individualized form of proof is the political opinion category. Thus, the courts have generally required proof of prior political activity in political asylum claims.²³¹ It must be emphasized that the four other categories are all status categories. Thus religion, nationality, race, and membership in a social group do not, by definition, require specific activity on the part of the individual who falls into that category. Thus, once the persecution of that race, religion, nationality, or social group has been established under a clear probability standard, it can be argued that the burden of proof is met, since no additional individual activity is required to bring about the persecution. In the type of membership case at issue here, once a showing of persecution of the occupational group has been established in conformity with the clear probability standard, and once the applicant proves that he or she is in fact a member of that group, it can be argued under the above analysis that the individual burden of proof has been met.

Such an approach, while significantly altering certain procedural requirements, would preserve the objective focus of standards of proof

226. See *supra* note 169 and accompanying text.

227. See *supra* notes 169-73 and accompanying text.

228. See *supra* notes 88-94, 119, 127 and accompanying text.

229. See *supra* notes 83-87 and accompanying text.

230. See *supra* note 114 and accompanying text.

231. See *supra* note 130 and accompanying text.

while resolving some of the problems of discriminatory application which have plagued the 1980 Act since its inception and which defy the intention of its drafters. For Salvadoran refugees, such an approach could permit a more satisfactory adjudication of many asylum claims.

VI. CONCLUSION

The limitations of current refugee admission practices and policies are apparent. Evidentiary and political constraints have operated to deny the vast majority of Salvadoran asylum claims. Such a denial has occurred notwithstanding the fact that El Salvador is a country where human rights violations are well-documented and where such abuses have already created a vast refugee population. Unable, in most cases, to obtain under current law satisfactory resolution of claims in either section 208 or section 243(h) proceedings, Salvadorans and others in similar situations could perhaps use the membership in a social group category contained in the refugee definition of the 1980 Act. Claimed membership in a social group raises important legal issues yet to be adjudicated. However, the use of an occupational classification in social group cases could create legally cognizable claims capable of meeting stringent burden of proof requirements. It is strongly recommended that independent sources of statistical evidence bearing on the probability of persecution be substituted for the current non-statistical State Department recommendations. Other evidentiary requirements relating to individualized threats of persecution would be altered under a social group theory to permit a showing that status, rather than prior individual political activity, was the source of persecution in the country of origin. This expansion of the Act's application would serve both the intent of the drafters of the UN Protocol and Convention and the documented humanitarian concerns of the drafters of the 1980 Refugee Act.